

# Gould Exhibit D

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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BMG RIGHTS MANAGEMENT (US) LLC, :  
et al., :  
 :  
Plaintiffs, :  
 :  
vs. : Case No. 1:14-cv-1611  
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 :  
COX ENTERPRISES, INC., et al., :  
Defendants. :  
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HEARING ON MOTIONS

June 26, 2015

Before: John F. Anderson, Mag. Judge

APPEARANCES:

John M. Caracappa, Paul Gennari, and Walter D. Kelley, Jr.,  
Counsel for the Plaintiffs

Brian D. Buckley and Craig C. Reilly,  
Counsel for the Defendants

**Pgs. 25-34**

1 your lost profit analysis.

2 MR. BUCKLEY: So two responses to that, Your Honor.  
3 One is, I think the first point you made is more of a causation  
4 issue. Even if you could figure out what component of a  
5 particular work, what value of that is related to downloads,  
6 how do you then connect the dots and say because Brian Buckley  
7 illegally downloaded this, I lost this dollar amount. That's a  
8 causation issue.

9 In terms of specifically how do each of these things  
10 relate to a calculation of actual damages, honestly, my expert  
11 is going to tell me that. I can't do it. But our expert is  
12 saying, I can't get to an actual damages number, whether it  
13 ends up being relevant or not, unless I have more information.

14 THE COURT: Okay.

15 MR. BUCKLEY: And, Your Honor, I don't think the case  
16 law is --

17 THE COURT: What's the time period that you're  
18 looking for for that information?

19 MR. BUCKLEY: Three years prior to the lawsuit being  
20 filed. So it was November of 2014. So we would go back three  
21 years from that date.

22 THE COURT: All right. Let me hear from the  
23 plaintiffs.

24 I know that's why you chose statutory damages,  
25 because you didn't want to have to go through and do all the

1 stuff trying to calculate actual damages, but --

2 MR. CARACAPPA: And because, as Your Honor noted,  
3 based on the financials alone, no one is sure how they are  
4 going to do it. Because once you illegally download or upload  
5 or make available for download or upload a piece of music, it  
6 affects every area of distribution. Because you don't just  
7 have the people that are uploading and downloading it, but it  
8 expands, and they make it available. And you could lose not  
9 only Internet sales, but you could lose streaming and record  
10 sales.

11 So there isn't any way for anybody to take these  
12 financials and come up with an actual damages number.

13 I do have, to the extent the Court is interested,  
14 what we have produced to Cox. Does the Court want to take a  
15 look at those?

16 THE COURT: Well, just explain it to me so that I  
17 know what it is.

18 MR. CARACAPPA: Okay. So what did is we have the  
19 song, we have the year, and we have the income generated from  
20 that song. It's my understanding it's for every copyrighted  
21 issue. If it's not, then we can go back and provide that  
22 information for every copyright at issue.

23 THE COURT: For both BMG and Round Hill? I mean,  
24 he's indicated that for Round Hill it's not broken down by  
25 year.

1 MR. CARACAPPA: That's correct, for Round Hill it is  
2 not broke down by year, and we can go back and do that.

3 THE COURT: But it's only revenue, not -- it only  
4 shows the revenue per work?

5 MR. CARACAPPA: That's correct. It's not broken down  
6 by channel, for example.

7 THE COURT: Well, why is revenue -- I mean, obviously  
8 profit is going to be less than revenue.

9 MR. CARACAPPA: Yes.

10 THE COURT: Why aren't they entitled to get some  
11 sense as to what has been the profit for each copyrighted work  
12 as opposed to merely just the revenue?

13 MR. CARACAPPA: It's my understanding that the client  
14 doesn't do that by song. The client doesn't -- the client is a  
15 business, it has profits and it has losses. The revenue  
16 generated by the songs go to its bottom line. But by song, it  
17 doesn't know how much profit or loss it has. Obviously, the  
18 songs that generate more income are more profitable for them.

19 And our issue was that the way the request is drafted  
20 and what they're asking for in the motion is far broader than  
21 anything that they're going to need to actually prepare an  
22 actual damages analysis.

23 The revenue per channel, the units underlying the  
24 revenue per channel, the metrics used, again all of that  
25 information we don't think they need to perform an actual

1 damages analysis. We think that what we provided is more than  
2 enough. And they haven't been able to explain how this  
3 additional information, that level of granularity, is going to  
4 inform their expert or a jury.

5 With respect to the information they ask for on  
6 page 4, it's the financial data related to the overall  
7 business, annual revenues, costs, expenses, incremental  
8 profits, that's not even asked for in any of their document  
9 requests or interrogatories.

10 THE COURT: Let me -- 106, 107, and 108, are they in  
11 the second --

12 MR. CARACAPPA: They are Exhibit A to Cox's --

13 THE COURT: All right, I've got it.

14 MR. CARACAPPA: I'm sorry, they are Exhibit A to our  
15 opposition.

16 THE COURT: Well, 106, all documents evidencing your  
17 loss of revenues and profits as a result of the infringements.

18 That would indicate one would have to produce  
19 documents relating to revenue and profits, right?

20 MR. CARACAPPA: The problem is: As the result of the  
21 infringements. And that's the issue that we have with the  
22 request and that's the issue that we've been talking about.  
23 Which is, you can't prove a but for, but for this one download  
24 we would have lost income related to the album sales, or  
25 digital downloads, or streaming, or licensing.

1 MR. BUCKLEY: Your Honor, can I make one point?

2 THE COURT: Okay. Thank you.

3 MR. BUCKLEY: That may all be true, and that's our  
4 problem and our expert's problem. Plaintiffs don't have to  
5 calculate any of this. When our expert does his analysis, if  
6 plaintiffs think there are issues with it, or that it's flawed,  
7 or that if it's not relevant, they are obviously free to argue  
8 that.

9 And it is not their burden to prove actual damages.  
10 They are proceeding on a statutory damages theory and are  
11 entitled to do that.

12 We, however -- and I really don't think the law is  
13 ambiguous on this. There are two Eastern District cases right  
14 on point. We have a right to prove actual damages and to  
15 introduce that as part of the statutory damages analysis.  
16 There is zero question that we can't do it with what we've been  
17 provided. I mean, Mr. Caracappa doesn't even dispute that. We  
18 can't do it with revenue figures.

19 So we have to have some additional detail. And the  
20 question is just what additional detail. And we've identified  
21 pretty specifically what our expert needs. It should not be --  
22 and again, I don't want to, I don't want to be glib about the  
23 burden here, but this is a very significant case with  
24 significant damages involved, going and collecting this  
25 information and providing it in the scope of all of the



1 discovery that's occurred in this case should not be relatively  
2 that burdensome.

3 THE COURT: I mean, I read in -- I can't remember  
4 which one of the two cases that I read that you've cited, I  
5 think it was the Dae Han Video Production one that I pulled up  
6 and read, the older one, it talks -- and my recollection of  
7 that case, and it was yesterday evening, was not that you prove  
8 what actual damages are, but it has to be some overall general  
9 relationship or some ballpark figure dealing with actual  
10 damages. Not that you are going to be coming in and proving  
11 what actual damages are, or that you're entitled to do that, or  
12 that that's necessary.

13 Am I -- did I --

14 MR. BUCKLEY: Well, what the cases say, Your Honor,  
15 is that when you're considering statutory damages, you  
16 actually -- one of the two Eastern District cases actually says  
17 you start with actual damages.

18 So I don't think there is any dispute about that. So  
19 then the question is just, how do you calculate actual damages?  
20 And again, that's not plaintiffs' problem or Your Honor's  
21 problem, we have to figure that out. Cox has to figure it out.  
22 And we have hired an expert to do that.

23 But in order to compare actual damages to statutory  
24 damages, somebody has to calculate actual damages, and we're  
25 going to take on the burden of doing that, but we need the data

1 to do it.

2 THE COURT: By copyright you plan to do that?

3 MR. BUCKLEY: We will try. And they have a financial  
4 expert who will look at what our expert does and I'm sure try  
5 to poke holes in it. And they will claim that his methodology  
6 is flawed, and we will have an argument about that, but we're  
7 entitled under the law to give it a try. And the case law says  
8 that when it comes time to actually consider damages, the Court  
9 needs to take actual damages into account. So somebody has to  
10 try.

11 THE COURT: What information does the plaintiff  
12 actually have that relates to the damages calculation? On a  
13 per channel basis and then about -- you know, I assume you  
14 don't keep documents as to each revenue minus operating income  
15 and things like that for each copyrighted work?

16 MR. CARACAPPA: That's right, we don't.

17 THE COURT: How is it that the records are kept or  
18 the books kept for each of the two plaintiffs here?

19 MR. CARACAPPA: Let me rephrase the question  
20 slightly.

21 THE COURT: Okay.

22 MR. CARACAPPA: I'm not exactly sure how the records  
23 --

24 THE COURT: It was probably poorly phrased, and I  
25 understand. No, I --

1 MR. CARACAPPA: I'm not exactly sure how the records  
2 are kept, but what they can do is they can break the copyrights  
3 down by channel. So they can do physical album sales, digital  
4 downloads, streaming royalties, and licensing royalties. And  
5 they can do that, it's my understanding, per copyright by year  
6 for both BMG and Round Hill.

7 THE COURT: Okay. So that's revenue?

8 MR. CARACAPPA: That is revenue --

9 THE COURT: Revenue for each copyright?

10 MR. CARACAPPA: Yes.

11 THE COURT: Okay. Are there -- and I take it the  
12 portfolio for the overall revenue for each of these entities  
13 comes from many more copyrights than just those that are  
14 involved in this lawsuit?

15 MR. CARACAPPA: Yes, Your Honor.

16 THE COURT: But if you knew the percentage of what  
17 this revenue is and the overall revenue, and you wanted to  
18 ballpark something, you could just assign -- if it's 20 percent  
19 here, 20 percent of the operating expenses, to come up with  
20 what ballpark would be, the actual profits per -- all right.

21 Do they keep -- I take it they would have to keep  
22 operating -- do an overall business level sheet of revenues,  
23 operating expenses, and profit, is that right?

24 MR. CARACAPPA: Yes, Your Honor, they do have that  
25 information generally with respect to the company --

1 THE COURT: Company, all right.

2 MR. CARACAPPA: -- not with respect to individual  
3 copyrights.

4 THE COURT: All right. What I'm going to do -- you  
5 know, I tell you, if I have them produce all this information  
6 and you decide I'm going to just ignore it, I'm going to award  
7 costs for them to do this.

8 I mean, you're asking for it. I'm not going to have  
9 them go off and do this fishing expedition to get you a bunch  
10 of information and then you just sit back and laugh about it.

11 I mean, you've represented to the Court that you've  
12 got an expert and that your expert is going to put in the time  
13 and effort and money to coming up with an actual damages  
14 calculation. And I'm not going to have them go off and do this  
15 just because you think it might be relevant, and then you get  
16 it and you decide, I don't want to use it. Okay. If you do  
17 that, you're going to pay for it.

18 MR. BUCKLEY: I understand, Your Honor. And I commit  
19 to you that that is absolutely not what this is about. We are  
20 going to use the information. This is not a fishing  
21 expedition. And we are certainly not going to just sit back  
22 and laugh that we imposed a burden on the plaintiffs. That's  
23 not what this is about.

24 THE COURT: All right. Well, I'm going to have them  
25 produce the information on a per channel basis and overall

1 company profit/loss information, operating expenses.

2 So that hopefully once you get your portion of the  
3 revenue from these copyrighted works during the time period,  
4 you can look at the portion of the revenue from the entire  
5 company and, you know, do -- your expert can come up with some  
6 type of analysis as to, you know, what share of the operating  
7 expenses and things and hopefully come up with some sort of a  
8 ballpark as to what the profit would have been for that based  
9 on the revenues per channel and overall revenue and profit from  
10 the company.

11 All right. So that will take care of that motion to  
12 compel.

13 The motion to seal, let's deal with that one next. I  
14 don't really understand why any of the information that you're  
15 asking to be filed under seal should be under seal.

16 You know, I went back and just -- if this case ends  
17 up having a lot of material that you are going to try and file  
18 under seal other than identifying information of subscribers,  
19 at some point we're going to have to deal with that issue, but  
20 the idea that ISP numbers are changed and information kept for  
21 a certain period of time, what is commercially sensitive,  
22 confidential, or whatever about that information that it  
23 shouldn't be in the public record? Or that, you know, certain  
24 records aren't kept after a certain period of time?

25 I went through -- and let me just -- I am going back